

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATIONS)
FOR BENEFICIAL WATER USE PERMITS) FINAL ORDER
NOS. 56782-s76H AND 56830-s76H)
BY BOBBY D. CUTLER)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of November 21, 1986, and incorporates them herein by reference.

WHEREFORE, based on the record including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER


Applications for Beneficial Water Use Permit Nos. 56782-s76H and 56830-s76H are hereby denied without prejudice.

CASE # 56782


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 3 day of March, 1987.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 56782

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 4, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Applications by Bobby D. Cutler, Application Nos. 56872-s76H and 56830-s76H, Applications for Beneficial Water Use Permits, addressed to each of the following persons or agencies:

Bobby D. Cutler
1094 Willow Creek Rd.
Corvallis, MT 59828

Helen Jenkins
1092-A Willow Creek Rd.
Corvallis, MT 59828

Bobby D. Cutler
Graduate Center
Box E-86
Pullman, WA 99165

Sharon Rollins-Qualters
P.O. Box 556
Corvallis, MT 59828

Merlin & Randy Campbell
1092 Willow Creek Rd.
Corvallis, MT 59828

Mike McLane
Water Rights Bureau
Field Office
P.O. Box 5004
Missoula, MT 59806

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4 day of March, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Vicky Kohn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE # 56782



Blue

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATIONS)	
FOR BENEFICIAL WATER USE PERMITS)	PROPOSAL FOR DECISION
NOS. 56782-s76H AND 56830-s76H)	
BY BOBBY D. CUTLER)	

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2 MCA (1985) and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6 MCA (1985), a hearing in the above-entitled matter was held on April 25, 1986 in Hamilton, Montana.

Appearances

Applicant Bobby D. Cutler appeared pro se.

Joint Objectors Merlin and Randy Campbell and Helen Jenkins (hereafter, "Objector Campbell/Jenkins" or "Objector") each appeared personally and without legal counsel.

--Hector Rasmussen appeared as a witness for Objector Campbell/Jenkins.

--Don B. Reilly appeared as a witness for Objector Campbell/Jenkins.

Michael P. McLane, Manager of the Missoula Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC").

Objector Sharon Rollins-Qualters did not appear in person or by representation.

CASE # 56782

STATEMENT OF THE CASE

Applicant seeks to appropriate waste and seepage arising from the Bitterroot Irrigation District Canal (hereafter, "BRID Canal") by diversion from two separate drainages: by Application for Beneficial Water Use Permit No. 56782-s76H, Applicant seeks to divert 30 gpm up to 24 acre-feet per year at a point of diversion located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana; by Application for Beneficial Water Use Permit No. 56830-s76H, Applicant seeks to divert 35 gpm up to 20 acre-feet per year at a point of diversion in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana. The waters would be pumped from each point of diversion and combined at a presently existing collection and storage tank to be used as required for irrigation and for lawn and garden watering.

Applicant alleges there is sufficient unappropriated water extant in the two drainages to supply the amounts he requests. In support of this allegation, he claims to have developed 1.2 gpm of "new water" by installation of an infiltration gallery in the western-most of two drainages from which he seeks to appropriate; further, he proposes to transport water over a "sink-hole" which exists in the western-most drainage, claiming that he will thereby develop 5 gpm of "new water" which presently is lost to the subsurface; and finally, he alleges that Objector Campbell/Jenkins' Statement of Claim is exaggerated. He asserts he is entitled to first priority in appropriating the "new

CASE # 56782

water", and that there is sufficient water, unappropriated by Campbell/Jenkins, to supply him with the balance of the requested appropriation.

Objector Campbell/Jenkins have jointly filed statement of Claim for Existing Water Rights No. 31044, which as amended claims "seepage and drainage" at a flow rate of 99 gpm up to a volume of 24 acre-feet per year, with a priority date of August 24, 1903, and points of diversion on the same drainage but down-drainage from each of Applicant's proposed points of diversion. The basis of the objection is that there are insufficient waters present in the two drainages from which Applicant seeks to divert to provide water for any new appropriations. Objector Campbell/Jenkins also denies that Applicant has developed or will develop "new water".

The hearing in this matter was completed on April 25, 1986 and the record was thereupon closed.

Exhibits

The Applicant submitted ten exhibits for the record in support of his Application.

Applicant Exhibit 1 is an 8-page document containing (1) a description of the proposed project; (2) a description of the proposed irrigation; (3) a hand-drawn map of the project; (4) a description of points marked on the hand-drawn map (map attachment #1); (5) a page entitled "New Water Development:

First Water Rights Claim"; (6) a page entitled "Does Excess Water Exist Under the Current Situation?"; (7) measurements on amount of water flow at various points; (8) a page entitled "How Much Excess Water Exists"; (9) a legal description of Applicant's property.

Applicant Exhibit 1 was admitted without objection.

Applicant Exhibit 2 is a photocopy of a plat map, purporting to show Applicant and Objector Campbell/Jenkins' properties with drainage locations marked thereon in blue ink, and entitled "Sapphire Pine Meadows."

Applicant Exhibit 2 was admitted without objection.

Applicant Exhibit 3 is a letter from Bobby Cutler to Michael P. McLane dated March 17, 1986.

Applicant Exhibit 3 was admitted without objection.

Applicant Exhibit 4 is a photograph taken on or about March 15, 1986 by Applicant, purporting to show a 1,000 gallon septic tank above-ground, presently used to store water for ultimate distribution to Applicant's property.

Applicant Exhibit 4 was admitted without objection.

Applicant Exhibit 5 is a photograph taken on or about March 15, 1986 by Applicant purporting to show a water collection tank presently supplying the septic storage tank shown in Applicant Exhibit 4 pursuant to Certificate of Water Right.

Applicant Exhibit 5 was admitted without objection.

Applicant Exhibit 6 is a photograph taken on or about March 15, 1986 by Applicant, purporting to show the western-most of Objector Campbell/Jenkins' two claimed points of diversion.

Applicant Exhibit 6 was admitted without objection.

Applicant Exhibit 7 is a photograph taken on or about March 15, 1986 by Applicant, purporting to show a portion of the western-most of the two drainages from which Applicant seeks to divert as viewed looking north (up-drainage), from a point located between Objector Campbell/Jenkins' claimed point of diversion and Applicant proposed point of diversion.

Applicant Exhibit 7 was admitted without objection.

Applicant Exhibit 8 is a photograph taken on or about March 15, 1986 by Applicant purporting to show water flow from a pond located in the western-most of the two drainages from which Applicant seeks to divert.

Applicant Exhibit 8 was admitted without objection.

Applicant Exhibit 9 is a typed statement executed by one Harry Yenne on April 21, 1986, and notarized by Anne A. Yenne, regarding irrigation of Merlin Campbell's property in 1984.

Applicant Exhibit 9 was objected to as hearsay as Mr. Yenne was not present at the hearing. However, hearsay is admissible under Administrative Rule of Montana 36.12.221(1) if it possesses probative value and is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs.

The Hearing Examiner hereby finds that Applicant Exhibit 9, although hearsay, meets the statutory criteria for admission because it pertains to Objector's claimed use of water and it is of the type of evidence commonly relied on by reasonably prudent persons. Objector Campbell/Jenkins' objection to its admission is therefore hereby overruled, and Applicant Exhibit 9 is hereby admitted. However, Objector Campbell/Jenkins' testimony concerning the veracity of the contents of the exhibits are also hereby noted.

Applicant Exhibit 10 is a typed statement executed by one Louis Jeffries on April 4, 1986, and duly notarized, regarding his association with the Ponderosa Mobile Home Court, now Applicant's property.

Although Objector Campbell/Jenkins alleged that the statement was hearsay, Applicant Exhibit 10 was admitted without objection.

Objector Campbell/Jenkins submitted four exhibits for the record.

Objector Campbell/Jenkins Exhibit A is a 9-page document dated April 25, 1986, entitled "Reference Items 10 through 16 of Original Document from the D.N.R.C." It includes a 3-page summary of information and facts supporting the objection.

The Exhibit also contains a rough graph purporting to represent 1984 flows in both the eastern and western drainages from which Applicant seeks to divert. In addition, said exhibit contains a photocopy of a hand-drawn map of the area of the

Objectors' claimed existing use as well as a photocopy of a 4-page handwritten statement entitled "Response to Cutler's Statement Concerning Water Rights of Campbell and Jenkins."

Objector Campbell/Jenkins Exhibit A was admitted without objection.

Objector Campbell/Jenkins Exhibit 2 consists of (1) a photocopy of a letter dated September 1, 1984 from Merlin Campbell to Mike McLane/LeNeante (sic); (2) a photocopy of a hand-drawn map of the western drainage from which Applicant seeks herein to divert, with water flow measurements and comments noted thereon; (3) a photocopy of a 2-page memo dated September 11, 1984 by Lynette K. Kemp regarding Field Investigation of Complaint by Merlin and Randy Campbell concerning Bobby Cutler's cistern; (4) a photocopy of an unsigned, undated, hand-drawn map purporting to show the area of the proposed diversions together with noted flow measurements; (5) a photograph of a hand-drawn map dated September 11, 1984 entitled "Measurement Taken With Lynette Kemp DNRC, Mrs. Campbell, Mrs. Helen Jenkins, Harry Yenna, Don Reilly present. Also Mr. Cutler."

Objector Campbell/Jenkins Exhibit 2 was admitted without objection.

Objector Campbell/Jenkins Exhibit C consists of uncertified photocopies of a Temporary Restraining Order and a Preliminary Injunction in Cause No. DV-89-284 entitled Merlin Glen Campbell, Randy Jean Campbell and Helen M. Jenkins, Plaintiff, vs. Bobby D. Cutler, Defendant.

Objector Campbell/Jenkins Exhibit C was admitted without objection.

Objector Campbell/Jenkins Exhibit D is a photocopy of a legal description purportedly attached as "Exhibit A" to a deed to Merlin Campbell.

Objector Campbell/Jenkins Exhibit D was admitted without Objection.

The Department offered one Exhibit for the record.

Department Exhibit 1 consists of a file entitled "Campbell/Cutler" which contains (1) a document entitled "Field Investigation - Application for Beneficial Water Use Permit #56782 and #56830, Bobby Cutler" prepared by Mike McLane, utilizing findings of Dave Pengally and Lynette Kemp, both former employees of DNRC; (2) a series of photographs taken by Mike McLane on March 16, 1986; (3) a photocopy of a September 7, 1979 aerial photo with notations made by Mike McLane, showing locations of Applicant's and Objector's property, drainages, etc; (4) an untitled topographic map showing the vicinity of Corvallis, Montana; (5) photocopies of letters from Dave

Pengally, former Missoula Field Office Supervisor, DNRC, to Bobby Cutler dated May 23, 1984 and June 25, 1984; (6) photographs taken by Dave Pengally on June 20, 1984; (7) a photocopy of a letter from Judy Loring, Attorney at Law, to Dave Pengally dated July 23, 1984; (8) a photocopy of a letter from Donald D. MacIntyre to Judy Loring dated August 1, 1984; (9) a photocopy of a letter from Donald D. MacIntyre to Mr. Bobby Cutler, dated August 2, 1984; (10) a photocopy of a letter from Merlin Campbell to Dave Pengally, received August 7, 1984, (11) a photocopy of a letter from Merlin Campbell to Dave Pengally dated August 6, 1984; (12) a photocopy of a letter from Lynette Kemp to Bobby Cutler, dated August 24, 1984; (13) a photocopy of a letter from Merlin Campbell to Mike/LeNeante (sic), dated September 1, 1984; (14) a three-page memo dated September 11, 1984 by Lynette Kemp regarding Field Investigation of Complaint by Merlin and Randy Campbell concerning Bobby Cutler's cistern; (15) a one-page memo dated September 11, 1984 by Lynette K. Kemp, subject: Field Investigation of Application for Beneficial Water Use Permit No. 56782 by Bobby D. Cutler; (16) a series of 4 photographs of Cutler's property taken by Lynette Kemp on September 11, 1984; (17) 2 photocopies of a letter from Michael P. McLane to Bobby Cutler dated March 5, 1986; (18) a letter from Bobby Cutler to Michael P. McLane dated March 27, 1986; (19) photocopies of aerial photographs 2 P-165 and 3 P-115; (20) a photocopy of a map entitled "Ravalli County Twp. 6 North, Rge. 20 West"; showing ditch locations; (21) photocopies of 1957 State Engineer Water Resource Survey pertaining to water rights of John H. Watts, C.S.

Patterson, Mrs. Edith Kennedy, John Hull and A.W. Whitesitt; (22) a handwritten letter from Sharon Rollins to "Michael" received April 5, 1986; (23) a photocopy of an affidavit by Sharon Rollins, dated January 2, 1986; (24) photocopies of various Department records pertaining to existing water rights of Sharon I. Qualters-Rollins, Bobby Cutler, Clayton Jenkins; (25) photocopies of Application for beneficial Water Use Permit by Bobby D. Cutler dated August 15, 1984; (26) photocopies of Application for Beneficial Water Use Permit No. 56718 by Merlin and Randy Campbell/Helen Jenkins; (27) a photocopy of a termination of Application for Beneficial Water Use Permit No. 56718 by Merlin and Randy Campbell dated August 6, 1984.

Applicant wished the record to reflect that page 5 of the Field Investigation cites statements made to Mike McLane by Objector Campbell regarding Mr. Campbell's conversations with Edith Kennedy, Hector Rasmussen and Gary Lockwood. Applicant regards these as hearsay but did not object to admission of the Exhibit.

Department Exhibit 1 was admitted without objection.

Department files Nos. 56782-s76H and 56830-s76H were admitted without objection.

CASE # 56782

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 56782-s76H was regularly filed with the DNRC on August 15, 1984 at 10:28 a.m. Application for Beneficial Water Use Permit No. 56830-s76H was regularly filed with the DNRC on August 15, 1984 at 10:27 a.m.

2. The DNRC has jurisdiction over the parties and over the subject matter herein.

3. The pertinent facts of both Applications were published in the Ravalli Republic on October 10 and 17, 1984.

4. The Applicant, along with Allen D. Cutler, owns the lands on which the proposed project would be situated and has a present bona fide intent to appropriate water for irrigation and lawn and garden use. (Testimony of Applicant.)

5. By Application for Beneficial Water Use Permit No. 56782-s76H, Applicant seeks to appropriate water at a rate of 30 gpm up to 24 acre-feet per year between April 1 and September 30, inclusive, of each year, as follows: up to 12.5 acre-feet per year for irrigation of 2.5 acres located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana; and up to 11.5 acre-feet per year for lawn and garden use upon 12.00 acres located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana.

By Application for Beneficial Water Use Permit No. 56830-s76H, Applicant seeks to appropriate water at a rate of 35 gpm up to 20 acre-feet per year between May 1 and September 15,

CASE # 56782

inclusive, of each year for lawn and garden use upon 15 acres located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana.

6. The source for Applicant's proposed project is primarily waste and seepage water from the BRID Canal generated during the months when the canal is flowing.

This waste and seepage constitutes the sole source under Application for Beneficial Water Use Permit No. 56782-s76H, with point of diversion in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana. Said point is in a draw running through the eastern portion of Applicant's property, (hereafter referred to as "the eastern draw").

The point of diversion under Application for Beneficial Water Use Permit No. 56830-s76H is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 West, Range 20 West, Ravalli County, Montana, which point is just below the head of a draw, which begins below the BRID Canal and runs through Applicant's property (hereafter referred to as "the western draw"). The source of water for this Application is waste and seepage from the BRID Canal in combination with a year-round spring flow, ultimate source unknown, of approximately 5 gpm. The combined flows arise intermingled in the same area of said draw when the BRID Canal is flowing; when the canal is not flowing only the spring flow arises. (Testimony of Applicant.)

7. The means of diversion proposed in Application No. 56830-s76H, from the western draw, is presently in place. The gallery which consists of four septic tanks set on end is

buried in the bed of the small stream (generated by the spring and BRID seepage), which emerges a few feet up the draw from the proposed point of diversion. The springs are covered with a cement cap over which a pump house would be constructed. Water would be pumped uphill from this gallery to a second similar gallery, located up a tributary of the western draw, which is presently in operation pursuant to Water Right No. C57869. From this second gallery the combined flows derived from both galleries would be pumped, as the flow pursuant to C57869 is presently, to a 1,000 gallon storage tank located adjacent to the BRID Canal uphill from, and to the northwest of, both galleries. (Testimony of Applicant.)

8. The proposed means of diversion pursuant to Application No. 56782-s76H, from the eastern draw, is as follows: A pond would be created in the eastern draw. Water collecting in the pond would be piped by gravity flow to a collection tank located down the draw near Willow Creek Road. Water would thence be pumped from that collection tank to the collection tank presently in operation under Water Right No. C57869. From there this water in combination with water collected pursuant to Application No. 56830-s76H and Water Right No. C57869 would be pumped to the 1,000 gallon storage tank above-mentioned. (Testimony of Applicant.)

9. The combined waters collected in the storage tank would be allowed to gravity flow through existing plastic main lines to various points in the place of use, which is a trailer park containing 23 trailer sites. The trailer sites together contain approximately 12 acres of lawn and garden space.

Each site would receive water from the main lines which would be applied using garden hose. Ninety per cent of the watering sites would have sufficient pressure for sprinkler operation. Watering frequency will be controlled by the trailer park manager.

Applicant also proposes to irrigate 2½ acres of land located between the trailers and Willow Creek Road for hay if the water is available. (Testimony of Applicant.)

10. The place of lawn and garden use as described in both Applications is in the SW¼SW¼ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana. At the hearing, Applicant testified that within that description there were approximately 12 acres of lawn and garden area. Application No. 56782-s76H specifies lawn and garden use on 12 acres. However, Application No. 56830-s76E requests lawn and garden use upon 15 acres. No explanation of the discrepancy was offered and all evidence apparent from the face of the record indicates that Applicant's intent is to utilize the water appropriated pursuant to both Applications on the same lawn and garden area which he describes as being 12 acres.

Therefore the Hearing Examiner finds that the size and place of use for lawn and garden watering is the same under both Applications, to wit: 12 acres located in the SW¼SW¼ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana.

11. The flow in the eastern draw arises after the BRID Canal begins flowing. The flow usually begins in early June of each year and gradually increases through the irrigation season, reaching a peak of approximately 30 gpm in September (Applicant Exhibit 1, Objector Campbell Exhibit A). The total volume arising yearly from the eastern draw is approximately 11 acre-feet. (Testimony of Mike McLane.)

12. The flow in the western draw is a continuous 5 gpm from shortly after the time the BRID Canal ceases flowing, around October 1 of each year, until after it begins to flow again in May. The flow begins to increase in May, reaching a peak of 30-35 gpm in September. The total volume arising from the western draw each year between April 1 and September 30 is approximately 24 acre-feet in total. (Testimony of Mike McLane.)

13. Objector Campbell's historic point of diversion from the eastern draw cannot be determined from the record.

14. Applicant alleges a natural sink-hole exists in the western draw below his proposed point of diversion but above Objector Campbell's historic point of diversion. He proposes to by pass the sink-hole with a plastic pipe alleging that the water then saved must be considered water developed by him.

Objector Campbell claims that this is not a natural sink-hole at all but is rather a pond created by a dam placed in the draw within the past 15 years by former owners of Applicant's trailer park to accommodate a septic line; that such dam may have had an outlet at one time, but there is none apparent now; and

that, were the dam removed and that portion of the western drainage restored to its original uninterrupted condition, water would not "sink" in the pond area.

Applicant proposes to pipe water over the "sink-hole" claiming that in this way he will be developing water not heretofore available. The Objector claims Applicant's proposal would merely approximate the original condition of the draw yielding a flow which Objector has already claimed.

Applicant admits a dam is in place. Further, a visual inspection by the Hearing Examiner made upon a site visit, indicates that the "sink-hole" is fostered by a dam placed across the western draw. It appears that water would less readily "sink" or be lost to the subsurface were it not ponded by the dam. Thus, the Hearing Examiner finds that the flow which is lost, is most probably lost due to the ponding of water caused by the dam and that a bypass pipe would serve only to liberate water which is not now, but in years previous to the establishment of the dam has been, available to prior appropriators.

15. Applicant claims that the installation of the proposed means of diversion in the western draw, an infiltration gallery presently in place, has increased the flow of water in the western draw by 1.2 gpm. Citing measurements recorded by Lynette Kemp in her memo of September 11, 1984 (Objector Campbell/Jenkins Exhibit 2), Applicant claims that the infiltration gallery has increased the flow of water to the surface. Applicant relies primarily on a section of the memo reciting an observation that,

CASE # 56782

with a pump in place and the infiltration gallery being pumped at 5 gpm, the downstream flow was decreased from 29.1 gpm to 25.3 gpm, that is, by only 3.8 gpm.

However, previously in the memo it was stated that, prior to pumping, the flow upstream from the cistern was measured at 30.3 gpm (this amount was calculated by adding together flows measured 10 feet up the two branches of the drainage). The flow as measured 20 feet below the cistern was 29.1 gpm. Thus there was already a loss of 1.2 gpm between these points when the pump was off.

Viewing all the data presented in the memo, it seems probable that the infiltration gallery causes a loss to the flow in the amount of 1.2 gpm by leaking that amount into the subsurface. During the test, when the 5 gpm pump was activated, the 1.2 gpm, instead of being lost to the subsurface, was pumped out of the gallery along with 3.8 gpm of surface flow.

As this memo was the only evidence introduced in support of Applicant's allegation that the infiltration gallery increases the flow in the western draw by 1.2 gpm, and as the memo itself, upon more complete examination, indicates that flow is lost to the subsurface when the pump is not running, and that the pump merely recovers what would not be lost but for the infiltration gallery, it can only be concluded that the gallery does not increase the flow in the draw by 1.2 gpm but rather decreases it by that amount.

16. On August 4, 1981, Merlin and Randy Campbell and Clayton B. and Helen M. Jenkins (Objector Campbell/Jenkins) duly filed a Statement of Claim of Existing Water Right No. 031044 claiming 99 gpm up to 8 acre-feet per year of seepage drainage and "springs" water for sprinkler and flood irrigation of 1-3/8 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, and 2 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, all in Township 6 North, Range 20 West, Ravalli County, Montana, between April 1 and September 30 of each year. The claim stated the water was diverted by headgate in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana, and conveyed by ditch and pipeline to the place of use. The water right was claimed as a use water right, priority date 1915.

On July 9, 1984, the claim was amended to reflect the "correct location of the source." The claimed point of diversion was changed to NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 6 North, Range 20 West, Ravalli County, Montana. On February 8, 1985, the claim was again amended to reflect (a) two additional points of diversion, SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, both points in Township 6 North, Range 20 West, Ravalli County, Montana; (b) an increase in claimed volume from 8 acre-feet per year to 24 acre-feet per year; and (c) that the claim was not based on a "use right" but rather on a filed appropriation right priority date August 29, 1903. The support for this priority date is evidently a Notice of Appropriation of Water Right of the same date for one cfs of waste water from the "Greene, Lockwood and Groff ditch from Willow Creek" to be used for domestic

purposes and irrigation in the SE $\frac{1}{4}$ of Section 2, Township 6 North, Range 20 West. The point of diversion is not specified in the document. (Department Records.)

17. The BRID Canal was constructed in 1912. (Testimony of Hector Rasmussen.) Accordingly, any appropriation of waste and seepage water arising from the BRID Canal cannot have commenced until at least 1912. Therefore the Hearing Examiner finds that the August 29, 1903 notice of appropriation regards an appropriation made from a source separate and distinct from the BRID Canal waste and seepage; that the claim as amended is inaccurate regarding the date of appropriation of BRID Canal waste and seepage; and that the claim as originally filed more accurately reflects the date of initial appropriation of BRID Canal waste and seepage.

18. The evidence suggests that the historic source for Claim No. 31044 has actually been a combination of three distinct sources initially appropriated at different times: (1) natural spring water flowing year-round at 5 gpm from the western draw, initially appropriated in 1903; (2) waste and seepage flowing in the western and eastern draws arising from the BRID Canal, initially appropriated after 1912; (3) runoff from irrigation of that portion of Section 1 which would collect in the eastern draw, initially appropriated in 1903. (Testimony of Hector Rasmussen, Department Records.)

19. Merlin and Randy Campbell have duly filed Statements of Claim for Existing Water Right Nos. 103833 and 104957. By the former claim .62 miner's inches up to 4.78 acre-feet per year of

Willow Creek water is claimed appurtenant to 5 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 6 North, Range 20 West, Ravalli County, Montana, for use between May 1 and October 1 of each year.

The latter claim is for .5 cfs (224.4 gpm) up to 153 acre-feet per year of spring and seepage water diverted at the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 6 North, Range 20 West, for use upon the same property during the same period as the former described right. However, Merlin Campbell testified at the hearing that the flow rate was in reality 15 gpm. A proportionate reduction in volume diverted yields an annual diverted volume of up to 10.2 acre-feet per year.

The five acres described as the place of use under both claims above-mentioned includes a portion of the 3-3/8 acre place of use claimed under Claim No. 31044, to wit: the 2 acres of that 3-3/8 acre tract which Merlin and Randy Campbell own. If a pro rata division of the rights claimed under Statements of Claim Nos. 103833 and 104957 is made so that an aggregate amount appurtenant to the 2 acres also claimed as a place of use under Statement of Claim No. 31044 can be arrived at, it is found that the 2 acre place of use claimed by the Campbells has a total of 8.8 gpm up to 6 acre-feet per year appurtenant to it, as well as the amounts claimed under Statement of Claim No. 31044.

20. There are no other planned uses or developments apparent from the record which require water from the sources herein for which a Permit has been issued or for which water has been reserved.

21. Applicant has estimated the needs of Objectors, using DNRC guidelines: Based on a theoretical crop requirement of 2 acre-feet per acre per year, Applicant calculates a crop requirement of 6.75 acre-feet per year with 90 days irrigation. Also assuming 24 per day irrigation, he has figured that delivery of the estimated volume would require a flow rate of 17 gpm. (Testimony of Applicant.) Applicant's calculations do not account for the level of conveyance/application system efficiency. (Testimony of Mike McLane.)

22. It is not uncommon to find a 20% use efficiency in the Bitterroot Valley. (Testimony of Mike McLane.)

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they appeared at the hearing or not. Title 85, Chapter 2, Part 3, MCA (1985).

2. The Department gave proper notice of the hearing and all substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

3. Section 85-2-311 MCA (1985) directs the Department to issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant,

- (ii) in the amount the applicant seeks to appropriate;
and
 - (iii) throughout the period during which the applicant
seeks to appropriate the amount requested is
available;
- (b) the water rights of a prior appropriator will not be
adversely affected;
 - (c) the proposed means of diversion, construction, and
operation of the appropriation works are adequate;
 - (d) the proposed use of water is a beneficial use;
 - (e) the proposed use will not interfere unreasonably with
other planned uses or developments for which a permit has
been issued or for which water has been reserved.

4. Those parties who failed to appear at the hearing in this matter, in person or by representation, are in default and their objections are hereby dismissed. Administrative Rule of Montana 36.12.208.

5. The proposed uses, lawn and garden, and irrigation, are beneficial uses. § 85-2-102(2) MCA (1985); Sayre v. Johnson, 33 Mont. 15, 81 P. 289 (1905).

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 20.)

7. Applicant alleges there is water in the western draw which has never been appropriated because it was not available to prior users appropriating from that draw. He claims (1) that he has already developed 1.2 gpm of water by installation of an infiltration gallery in the bed of the western draw; and (2) that he can develop 5 gpm of water in the western draw by piping the stream across a "sinkhole" located in said draw. Applicant asserts that he should be entitled to the exclusive use of 6.2 gpm of water in the western draw by reason of development.

While it is true that, if by his own exertion, a person has developed a supply of water theretofore not part of waters available to the users of a stream, such person has the first right to take and use such increase, Beaverhead Canal Co. v. Dillon Electric L. & P. Co., 34 Mont. 135, 85 P. 880, "it is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel to the benefit of other prior appropriators which the law recognizes as an increase of that character which can be diverted as against those entitled to its natural flow." Smith v. Duff, 39 Mont 382, 102 P. 984 (1909) quoting from Buckers I.M. & I Co. v. Farmer's Independent Ditch Co., 31 Colo. 62, 72 P. 49. Thus, as Applicant asserts that certain waters in the western draw are unappropriated and that he is entitled to the exclusive use of such water by reason of the development by him, he must prove that he is not interrupting the supply to which Objector Campbell/Jenkins is rightfully entitled. See Smith v. Duff, supra at 391.

As to the alleged 1.2 gpm development, the evidence indicates that the surface flow is actually decreased by that amount due to the presence of Applicant's infiltration gallery. (Finding of Fact 15.) However, even if Applicant could have shown an increase in surface flow, he still would have to prove that he was not intercepting a supply to which Objector is entitled. As the Court stated in Smith v. Duff, supra, at 390, ". . . the subsurface supply of a stream . . . is as much a part of the stream as is the surface flow and is governed by the same rules." Accordingly, the flow which Applicant theoretically might have brought to the surface by means of his infiltration gallery could well have naturally percolated to the surface before it reached Objectors' point of diversion. At a minimum, proof that such was not the case would be required. Regardless, Applicant has wholly failed to demonstrate development of any water by the installation of the infiltration gallery near the head of the western draw.

As to the alleged 5 gpm development, Applicant has failed to prove that said 5 gpm was not available to Objectors. The evidence shows that the water Applicant wishes to "develop" has historically been available to prior appropriators, that is, it was available prior to the installation of the blockage in the stream within the past 15 years, (Finding of Fact 14); and, although Objector may have not required water lost in that period, there is no evidence of intent to abandon it. (At best, Objector's lack of use tends to show that Objector would not be adversely affected by the appropriation of that 5 gpm, providing

of course that the reason Objector did not use the water was lack of need rather than the absence of water.) In sum, installation of a pipe over the "sinkhole" would not result in a development of water.

8. Applicant and Objector Campbell/Jenkins dispute the amount of unappropriated water available. This dispute is predicated upon the claimed size of the Campbell/Jenkins water right. Objector asserts the accuracy of its claim; Applicant maintains that the quantities claimed therein are in great excess of actual historic use. In the balance rides the outcome herein.

Final determinations concerning water rights which vested prior to 1973 are solely within the province of the water court adjudication system as set forth in Title 85, Part 2, Chapter 2, MCA (1985). However, no such final determinations have been made as to the water claimed herein. Nevertheless the Department must ascertain the extent of existing water rights on the source, in order to determine whether unappropriated water exists, so that it may perform its mandated function of authorizing or denying applications. In the Matter of Beneficial Water Use Permit No. 43117-s41P by Morris Mancoronel, Proposal for Decision April 18, 1984, pp. 16, 17 (Final Order June 14, 1984).

Section 85-2-227 MCA (1985) provides that a duly filed claim of existing right constitutes prima facie proof of its content until issuance of the final decree. "Prima facie evidence" is that which proves a particular fact until contradicted or overcome by other evidence. § 26-1-102 MCA (1985). Thus, a duly filed claim is proof of its content unless the claim is rebutted or contradicted by other evidence. Production of evidence which

tends to rebut or contradict the content of the claim requires that the Department look beyond the prima facie effect of the claim in order to ascertain the extent of the water right. This may be accomplished in two ways.

§ 85-2-309(2) MCA (1985) provides:

At any time prior to commencement or before the conclusion of a hearing . . . , the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification or relative priority date.

Prior to the enactment of this subsection (amended Section 6, Ch: 596, L. 1985), the only method by which such determination could be made was by preliminary administrative finding. Thus, as is implied by the words "in its discretion" (the Department's discretion as stated in § 85-2-305(2) MCA (1985)), the Department has the option of making a preliminary administrative finding or certifying the issue to the district court. Of course, if the Department makes the finding itself, such administrative decision does not carry the weight of finality as to determinations of ownership, nor does the Applicant ultimately obtain any rights that are not contingent upon a final determination of the extent of the objector's right in the adjudication process.

In the instant case, the Department declines to certify the issue of the extent of Objector's water right to the district court and will instead make a preliminary administrative finding.

9. If the Campbell/Jenkins claim is taken at face value, the evidence indicates that a volume of at least 11 acre-feet (AF) of unappropriated water is available to Applicant (35 AF total yearly production by both sources minus 24 AF claimed by Objector = 11 AF). (Findings of Fact 11, 12, 16.) However, Objector Campbell/Jenkins also claims a flow rate of 99 gpm (Finding of Fact 10). Considering the flow available in the drainage (maximum of 65 gpm) (Findings of Fact 11, 12), there would be insufficient flow to allow diversion by Applicant at times when Objector is diverting the claimed flow.

If, on the other hand, as Applicant alleges, the Campbell/Jenkins claim is inaccurate and overstated, more unappropriated water would be available for Applicant. To support this allegation, Applicant has attempted to estimate, based on DNRC guidelines, the amount of water necessary to irrigate the 3-3/8 acres comprising the Campbell/Jenkins place of use. His calculations, based on a theoretical crop requirement of 2 acre-feet/acre per year, yield a crop requirement of approximately 6.75 acre-feet per year assuming 90 days of irrigation. Also assuming 24 hour per day irrigation throughout the 90 days of irrigation, the calculated volume translates to a required flow rate of 17 gpm. However, Applicant's calculations are idealized and fail to account for either historic patterns of use or historic use efficiencies. (Finding of Fact 21.)

Regarding use efficiency: It is not absolute efficiency which is required of a means of diversion; rather, it is reasonable efficiency in view of the existing physical conditions and circumstances which is required. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). Thus, were

Objectors' historic use efficiency ascertainable from this record, which it is not, Applicant's calculations would require modification to reflect same, providing the use efficiency was reasonable under the circumstances. Lacking such data, no accurate determination of Objectors' historic need can be made.

However, it is a matter of record that use efficiencies in the Bitterroot Valley can be as low as 20 percent (Finding of Fact 22), although whether such 20 percent is reasonable also cannot be determined based on this record. However, this datum may be used to set a preliminary upper limit on the Campbell/Jenkins claim, for it is improbable that a use efficiency less than 20 percent would be found reasonable.

Assuming arguendo that historically the conveyance and application efficiency was found to be 20 percent, and that 20 percent efficiency was found to be reasonable based on the irrigation practices of the area, utilizing the idealized parameters which Applicant has calculated, multiplication by 5 would yield the diversion requirements for a 20 percent efficient conveyance and application system. Such calculation indicates that a total yearly volume of 25 acre-feet per year would be required as measured at the points of diversion in order to obtain the required acre-feet at the place of use. Hence, the claimed volume of 24 acre-feet per year is within the realm of reason (though perhaps on the high side thereof).

However, additional appurtenant rights claimed by the Campbells must also be considered in determining the reasonableness of the Campbell/Jenkins claim. An additional 8.8 gpm up to 6 acre-feet per year of water available to 2 acres of

the 3-3/8 acre parcel (Finding of Fact 19) should reduce demand on the remaining source by the same amount. Accordingly, the maximum annual volume diverted under Campbell/Jenkins Claim No. 31044 would be 19 acre-feet per year (25 AF necessary for irrigation assuming 20% efficiency minus 6 AF appropriated under Claims 103833 and 104957 = 19 AF). The remainder, approximately 16 acre-feet per year, is available for appropriation (35 AF per year produced by both sources minus 19 AF required by Objector = 16 AF).

Regarding flow rate: most irrigators do not divert continually throughout the period of appropriation and there is no evidence to support such a pattern of use here. Applicant's premise of 90 days continuous use by Objector is also speculative. As his conclusions as to the amount of flow which would adequately deliver the volume of water claimed when it is needed are based on assumptions, no reliable inference as to what is a reasonable flow rate can be drawn from the evidence presented and, Objectors' claim must stand as the best evidence regarding historic flow rate, limited only by the fact that no more than 65 gpm is currently provided by the source. (Findings of Fact 11, 12.)

Thus the Hearing Examiner finds that there is at least a total volume of 16 acre-feet per year of unappropriated water available from the sources specified in both captioned Applications. This volume, however, is available for appropriation only to the extent that Objector Campbell/Jenkins do not require the full flow of water produced by both sources.

10. The proposed means of diversion cannot be administered so as to prevent adverse effect to Objector Campbell/Jenkins.

If a permit was granted, Applicant would be restricted to diverting water only to the extent that Objector does not require the full flow of water produced by the source. Hence, any diversion works placed upstream from Objector's point of diversion would require continuous supervision. Periods of diversion would have to be coordinated with Objector's pattern of use. Continuous monitoring of Objector's headgate by Applicant (or his manager) would be required, for without diligent responsive handling of the diversion works, Objector would have to call upon Applicant virtually every time he wished to irrigate.

If Applicant had instead proposed point of diversion downstream from that of Objector, the works would be self-regulating. Water would be available when Objector was not diverting; if Objector was not diverting the full flow produced by the source, excess water would be available; if Objector was diverting the full flow, no water would be available. Objector would never have to call upon the Applicant. However, whether such placement of the diversion works would adequately fulfill Applicant's needs remains unknown, for the evidence will not allow for a conclusion as to that alternative. However, it is clear that placement of Applicant's points of diversion as designed upstream from Objectors' points of diversion would adversely affect Objectors, for Applicant has proposed no system of administration which would free Objector from the burden of having to call for water every time it is needed.

11. As the evidence indicates there is unappropriated water available in the sources herein specified, Applicant is free to reapply for a Permit to develop this water when he is able to submit a plan for diversion works consonant with the findings and conclusions herein.

WHEREFORE, based upon the foregoing and the evidence on the record herein, the Hearing Examiner proposes the following:

ORDER

That Applications for Beneficial Water Use Permits Nos. 56782-s76H and 56830-s76H be denied without prejudice.

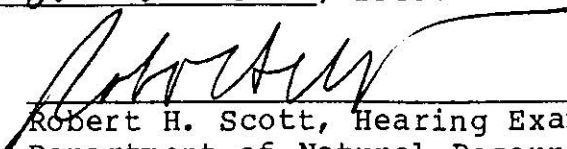
NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 21 day of November, 1986.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 56782

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 21, 1986, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION, an order by the Department on the Application for Beneficial Water Use Permit No. 56782-s76H by Bobby D. Cutler, addressed to each of the following persons or agencies:

1. Bobby D. Cutler, 1094 Willow Creek Rd., Corvallis, MT 59828
2. Bobby D. Cutler, Graduate Center, Box E-86, Pullman, WA 99163
3. Merlin & Randy Campbell, 1092 Willow Creek Rd., Corvallis, MT 59828
4. Helen Jenkins, 1092-A, Willow Creek Rd., Corvallis, MT 59828
5. Sharon Rollins-Qualters & James E. Qualters, P.O. Box 556, Corvallis, MT 59828
6. Mike McLane, Manager, Water Rights Bureau Field Office, P.O. Box 5004, Missoula, MT 59806 (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources Division, DNRC, 1520 E. 6th Ave., Helena, MT 59620 (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 21ST day of November, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 56782